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### Deposited in DRO:

14 June 2016

### Version of attached file:

Accepted Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Jones, Annika (2016) 'Non-cooperation and the efficiency of the International Criminal Court.', in Cooperation and the International Criminal Court : perspectives from theory and practice. Leiden: Brill, pp. 185-209. Nottingham studies on human rights. (4).

### Further information on publisher's website:

[http://dx.doi.org/10.1163/9789004304475\\_008](http://dx.doi.org/10.1163/9789004304475_008)

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# Non-Cooperation and the Efficiency of the International Criminal Court

Annika Jones

## Abstract:

This chapter examines the relationship between the failure of States to comply with the ICC's requests for cooperation and the efficiency, *i.e.* the speed and cost-effectiveness, of the Court. It does so from two angles: firstly, by looking at the impact of non-cooperation on the efficiency of the ICC, with reference to the Court's investigations in Darfur, Sudan and Kenya, and, secondly, by considering how the inefficiency of the ICC could affect the willingness of States to comply with the Court's cooperation requests. It argues that the relationship between efficiency and non-cooperation can be understood to have a cyclical dimension, whereby inefficiency could lead to non-cooperation and *vice versa*. The cycle is one that can be addressed from within the ICC and the Court's legislative and management body, the ASP, by taking measures to enhance the efficiency of the ICC's operation. The chapter draws attention to measures that are currently being taken to this end, which may have a positive impact on levels of State cooperation in years to come.

Keywords: International Criminal Court; non-cooperation; efficiency; effectiveness; Situation in Darfur, Sudan; Situation in Kenya.

## 1. Introduction

One of the most significant challenges that the ICC has faced since its creation in 2002 has been that of securing State cooperation. The ICC, much like the ICTY and ICTR (*ad hoc* Tribunals), which preceded the Court's establishment, relies heavily on the cooperation of States for the investigation and prosecution of the crimes that fall within its jurisdiction.<sup>1</sup> The ICC Statute identifies a number of ways in which the ICC is dependent on States, from the arrest and surrender of suspects to the preservation of evidence and the protection of victims and witnesses.<sup>2</sup> In its short period of operation, the failure of States to cooperate with the ICC has frustrated the Court's proceedings significantly.

This chapter examines the relationship between non-cooperation and the efficiency (namely, the speed and cost-effectiveness) of the ICC. The chapter begins by highlighting

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<sup>1</sup> Ciampi, 'The Obligation to Cooperate' in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 1607-1608; Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 144 at 164.

<sup>2</sup> Arts. 89 and 93 ICC Statute.

the impact of the failure of States to cooperate with the Court on the efficiency of its proceedings. It draws from the Court's early investigations in Darfur, Sudan, and Kenya to demonstrate the significant impact that non-cooperation has had on the ability of the Court to seek justice for the crimes that fall within its jurisdiction, and to do so efficiently and effectively. The chapter goes on to consider the potential for the inefficiency of the ICC, conversely, to affect the willingness of States to cooperate with the Court. It argues that the relationship between efficiency and non-cooperation can be understood to have a cyclical dimension, whereby inefficiency within the ICC could encourage non-cooperation from States, which could, in turn, produce further inefficiency. The cycle is one that must be addressed from within the ICC and the Court's legislative and management body, the ASP, by taking measures to encourage efficiency in all aspects of the Court's operation, including responses to non-cooperation. It concludes by highlighting measures that are currently being taken to this end.

## **2. The impact of non-cooperation on the efficiency of the International Criminal Court**

The ICC's battle with non-cooperation was anticipated even before the Court came into operation.<sup>3</sup> The difficulties faced by the *ad hoc* Tribunals had already demonstrated the importance of State support for the pursuit of international criminal justice in an international system without its own enforcement agency. The *ad hoc* Tribunals were theoretically in a strong position to secure the cooperation of States, having been established under the UNSC's Chapter VII powers under the UN Charter and, consequently, having the benefit of recourse to sanctions from the UNSC in the event that States failed to cooperate.<sup>4</sup> Nonetheless, the tribunals experienced 'considerable resistance and obstruction' from States, including those who were not directly involved in the relevant conflicts.<sup>5</sup> Their struggle for cooperation, particularly in relation to the arrest and surrender of high level accused,<sup>6</sup> has extended the lifespan of the institutions significantly.

The ICC is in a far weaker position than the *ad hoc* Tribunals in securing the cooperation of States. This is due to the fact that the legal basis of the Court lies in a multilateral treaty, as opposed to the Chapter VII UN Charter powers of the UNSC. The treaty basis of the ICC has several implications. Firstly, whilst all States were bound to cooperate

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<sup>3</sup> Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) *supra* n 1 at 164.

<sup>4</sup> Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) 21 *Leiden Journal of International Law* 431 at 438.

<sup>5</sup> *Ibid.*

<sup>6</sup> Wald, 'Apprehending War Criminals: Does International Cooperation Work?' (2012) 27 *American University International Law Review* 229 at 231.

with the *ad hoc* Tribunals, only State Parties are bound to cooperate with the ICC. This is unless an obligation to cooperate with the Court is included in a resolution referring a situation to the ICC under Art. 13 ICC Statute or the relevant non-State Party has entered into an agreement to cooperate with the Court under Art. 87(5) ICC Statute. Secondly, whereas the *ad hoc* Tribunals could, in theory, benefit from the imposition of sanctions from the UNSC in situations of non-compliance, the ICC cannot, unless the UNSC has referred the situation to the Court. The most severe response that the Court can take to instances of non-cooperation is a judicial finding of non-cooperation and diplomatic pressure through its legislative and management body, the ASP.<sup>7</sup> Thirdly, the provisions for cooperation within the ICC Statute acknowledge several bases for postponement or refusal to cooperate with the Court.<sup>8</sup> In light of these provisions, the ICC's cooperation regime has been seen to demonstrate more of the 'horizontal' features of consensual, inter-State cooperation than the 'vertical' nature of cooperation between States and the *ad hoc* Tribunals.<sup>9</sup> The language of the ICC's cooperation provisions, which make reference to 'requests' for cooperation and avoid reference to 'orders', is also reflective of a consensual cooperation model.

The weakness of the ICC's cooperation regime has been exposed on a number of occasions in the early years of the Court's operation. Whilst the Court had managed to secure a fair level of cooperation from States that had referred their own situations to the Court,<sup>10</sup> serious issues began to arise following the Prosecutor's decision to initiate an investigation into the Situation in Darfur, Sudan. The Situation in Darfur was referred to the ICC by the UNSC in January 2005.<sup>11</sup> The referral followed a report of the International Commission of Inquiry on Darfur, which had established that serious violations of international human rights law and international humanitarian law,

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<sup>7</sup> See Art. 87(7) ICC Statute (State Parties) and Art. 87(5) ICC Statute (Non-State Parties).

<sup>8</sup> These include concern for the protection of national security (Art. 72 ICC Statute), the protection of third party interests (Arts. 73 and 93(9)(b) ICC Statute), competing requests for extradition from third States (Art. 90 ICC Statute) and the existence of conflicting obligations under international law (Art. 98 ICC Statute). See Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) *supra* n 4 at 433.

<sup>9</sup> On the distinction between 'horizontal' and 'vertical' powers, see ICTY, *Prosecutor v Tihomir Blaskic* Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-94-14 (29 October 1997). For discussion of the ICC's mix of horizontal and vertical features, see Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) *supra* n 4 at 432-33.

<sup>10</sup> The ICC's early self-referrals included situations in Uganda, the Democratic Republic of the Congo and the Central African Republic. It should be noted that the ICC has encountered cooperation issues in relation to its investigations in Uganda. See Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31 *Human Rights Quarterly* 655 at 678-89.

<sup>11</sup> UNSC Res 1583, 28 January 2005, S/RES/1583 (2005).

amounting to crimes under international law, had been committed with the involvement of Government forces and militias.<sup>12</sup>

The referral of the situation to the ICC by the UNSC provided a strong basis for cooperation, giving the Court 'the legal and ostensible political backing of the world body.'<sup>13</sup> The resolution referring the situation to the ICC urged 'all States' to 'cooperate fully' with the Court, placing an obligation on non-State Parties as well as State Parties to the ICC Statute to cooperate with the Court.<sup>14</sup> However, this was the first situation that the Prosecutor had begun to investigate without the support of the territorial State. It was also the first situation in relation to which the Court had issued an arrest warrant against a sitting Head of State; President Al Bashir. These facts made the Darfur case an important test for the ICC's cooperation regime.

Six years after the issuance of an arrest warrant against President Al Bashir, the accused remains at large.<sup>15</sup> Three other suspects have also evaded arrest and surrender, namely Ahmad Muhammad Harun (Ahmad Harun) (Former Minister of State for the Interior of the Government of Sudan, and Minister of State for Humanitarian Affairs of Sudan), Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) (Alleged leader of the Janjaweed Militia) and Abdel Raheem Muhammad Hussein (Minister of National Defence, former Minister of the Interior and former Sudanese President's Special Representative in Darfur).

The Pre-Trial Chamber of the ICC has made a number of judicial findings of non-cooperation in relation to the situation in Darfur. In May 2010, the Pre-Trial Chamber issued a decision in the case of *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, informing the UNSC of Sudan's failure to cooperate with the Court in the arrest and surrender of the accused, contrary to its obligations under UNSC Resolution 1583 (2005).<sup>16</sup> The Chamber made further findings of non-cooperation in

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<sup>12</sup> ICC, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to UN Security Council Resolution 1564 (2004) of 18 September 2004', ICC, 25 January 2005, available at: [www.legal-tools.org/doc/1480de/](http://www.legal-tools.org/doc/1480de/) (last accessed 20 August 2015).

<sup>13</sup> Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) *supra* n 10 at 666.

<sup>14</sup> UNSC Res 1583 (2005) *supra* n 11 at para 2.

<sup>15</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (4 March 2009); ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-95 (12 July 2010).

<sup>16</sup> ICC, *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57 (25 May 2010).

relation to Sudan in the case of *Prosecutor v Omar Hassan Ahmad Al Bashir* in March 2005,<sup>17</sup> and in the case of *Prosecutor v Abdel Raheem Muhammad Hussein* in June 2015.<sup>18</sup>

Other decisions have been issued by the Pre-Trial Chamber in relation to the non-cooperation of Chad,<sup>19</sup> Kenya,<sup>20</sup> Djibouti,<sup>21</sup> Malawi,<sup>22</sup> and the DRC.<sup>23</sup> Each decision concerned the failure of the relevant State to cooperate in the arrest and surrender of President Al Bashir when he had entered their territory. It is important to note that each of these States is a State Party to the ICC Statute and has an obligation to cooperate with the Court under the ICC Statute, as well as UNSC Resolution 1583.<sup>24</sup> On each occasion, the Court has referred the matter to the UNSC, allowing it to take measures deemed appropriate. However, despite appeals from the current and former Prosecutors of the ICC,<sup>25</sup> the UNSC has not taken any formal measures to sanction States that have failed to

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<sup>17</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227 (9 March 2015).

<sup>18</sup> See ICC Press Release, 'ICC Pre-Trial Chamber II refers to the UNSC Sudan's non-cooperation and failure to arrest Mr Abdel Raheem Hussein', ICC, 26 June 2015, ICC-CPI-20150626-PR1123, available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1123.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1123.aspx) (last accessed 20 August 2015).

<sup>19</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109 (27 August 2010). ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG (13 December 2011). ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-151 (26 March 2013).

<sup>20</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107 (27 August 2010).

<sup>21</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, ICC-02/05-01/09-129 (12 May 2011).

<sup>22</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr (13 December 2011).

<sup>23</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 (9 April 2014).

<sup>24</sup> UNSC Res 1583 (2005) *supra* n 11.

<sup>25</sup> See e.g. ICC-OTP, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', ICC, 12 December 2014, available at: [www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/stmt-OTP-20th-report.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/stmt-OTP-20th-report.aspx) (last accessed 20 August 2015). See also discussion in Wald, 'Apprehending War Criminals: Does International Cooperation Work?' (2012) *supra* n 6 at 232.

comply with their obligation to cooperate with the Court. In December 2014, the Prosecutor of the ICC indicated that in the absence of support from the UNSC, she would need to 'hibernate investigative activities in Darfur'.<sup>26</sup>

Whilst the Prosecutor has since provided reassurance that investigative activities are continuing in Darfur, and stressed the determination of her Office to 'bring independent and impartial justice to the people of Sudan',<sup>27</sup> the failure of States to cooperate with the ICC's investigations in Darfur has had an obvious impact on the efficiency of the Court. Considerable time and resources have been invested in the ICC's investigations, which cannot proceed to trial without the arrest and surrender of the accused. The failure of Sudan and other States to cooperate with the Court's investigations has increased the length and, consequently, the cost of the Court's proceedings. In doing so, it has contributed to a general sense of frustration with the slow pace of justice at the ICC and dissatisfaction with the small number of cases that the Court has seen through to completion.<sup>28</sup> This is problematic insofar as it affects the perceived effectiveness of the ICC in the eyes of States, victim groups and the international community more generally.

Another situation in which the Court has struggled considerably for cooperation is that of Kenya. The Court's investigation in Kenya concerns the post-electoral violence that took place on the territory of Kenya from 2007 to 2008. The Kenyan situation was another test case for the ICC. It was the first investigation that the Prosecutor of the Court had initiated using *proprio motu* powers of investigation; powers which had been contentious during the drafting of the ICC Statute.<sup>29</sup> As with the Situation in Darfur, Sudan, the Situation in Kenya involves high-level government officials. Summonses to appear were issued in 2011 against three individuals, including Uhuru Muigai Kenyatta and William Samoei Ruto, now President and Deputy President of the Republic of Kenya.<sup>30</sup>

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<sup>26</sup> Ibid, ICC-OTP, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (2014) at para 4.

<sup>27</sup> ICC-OTP, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', ICC, 29 June 2015, available at: [www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/29-06-15-otp-report-unscc.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/29-06-15-otp-report-unscc.aspx) (last accessed 20 August 2015) at paras 12 and 25.

<sup>28</sup> See *infra* Section 3.A.

<sup>29</sup> Bergsmo and Pejić, 'Article 15: Prosecutor' in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2<sup>nd</sup> edition (Baden-Baden: Nomos, 2008) 581-585.

<sup>30</sup> ICC, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-01 (8 March 2011). ICC, *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01 (8 March 2011).

Unlike Sudan, Kenya is a State Party to the ICC Statute and, as such, has an obligation under the ICC Statute to cooperate with the Court's investigation. Despite the voluntary appearance of the accused before the Court, the Prosecutor of the ICC has struggled to secure the cooperation of the Kenyan Government, particularly in relation to the transfer of records required for the Court's investigations.<sup>31</sup> On 29 November, 2014, the OTP filed an application for a finding of non-cooperation against the Kenyan Government, claiming that it had not complied with a request to provide financial and other records relating to Kenyatta.<sup>32</sup> The Trial Chamber found that the approach of the Kenyan Government to the ICC's cooperation requests had 'fall[en] short of the standard of good faith cooperation required under Article 93 of the [ICC] Statute'.<sup>33</sup> The Chamber was not, however, persuaded that a referral to the ASP would facilitate a fair trial or the interests of justice, since it may lead to 'further uncertainty and potential delay for the proceedings'.<sup>34</sup> The decision of the Trial Chamber was subsequently reversed, following an appeal from the Prosecutor, and remanded for the Trial Chamber to determine anew whether Kenya had failed to comply with its obligation to cooperate under the Rome Statute and to consider the appropriateness of referring the matter to the ASP.<sup>35</sup> In a separate decision, the Trial Chamber denied the Prosecutor's request to adjourn the case until the Kenyan Government complied with the request for cooperation.<sup>36</sup>

Against the background of the difficulties outlined above, the Prosecutor of the ICC, Mrs Fatou Bensouda, gave notice to withdraw the charges against Kenyatta in December 2014.<sup>37</sup> In a press release issued on the same day, Bensouda highlighted three 'severe challenges' that her Office had faced in the investigation of Kenyatta, including the non-

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<sup>31</sup> Evenson, 'Justice for Kenya Stumbles at the ICC', *HRW*, 7 January 2014, available at: [www.hrw.org/news/2014/01/07/justice-kenya-stumbles-icc](http://www.hrw.org/news/2014/01/07/justice-kenya-stumbles-icc) (last accessed 20 August 2015).

<sup>32</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya, ICC-01/09-02/11-866-Conf-Exp (29 November 2013). A public redacted version was filed as ICC, *Prosecutor v Uhuru Muigai Kenyatta* Public redacted version of the Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya, ICC-01/09-02/11-866-Red (2 December 2013).

<sup>33</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute, ICC-01/09-02/11-982 (3 December 2014) at para 78. See also ICC Press Release, 'Kenyatta Case: ICC Trial Chamber Rejects Request for Further Adjournment and Directs the Prosecution to Indicate Either Its Withdrawal of Charges or Readiness to Proceed to Trial', ICC, 3 December 2014, ICC-CPI-20141203-PR1071, available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/pr1071.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1071.aspx) (last accessed 20 August 2015).

<sup>34</sup> Ibid, ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute (2014) at para 82.

<sup>35</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', ICC-01/09-02/11-1032 (19 August 2015) at para 98.

<sup>36</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute (2014) supra n 34 at para 83.

<sup>37</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983 (5 December 2014).



cooperation of the Kenyan Government with the Court's cooperation requests, which, she argued, had 'compromised the Prosecution's ability to thoroughly investigate the charges'.<sup>38</sup> She explained as follows:

From the time that the Prosecution submitted its revised 8 April 2014 Request to the Government of Kenya, the material the Government sent us simply did not respond to a significant portion of our Revised Request for Records. In short, most of the material sought in my Revised Request was not provided. This is despite the fact that the ICC Judges clearly confirmed that my Revised Request was valid, and dismissed all of the Government's objections to it.

In this situation the most relevant documentary evidence regarding the post-election violence could only be found in Kenya. Yet, despite assurances of its willingness to cooperate with the Court, the Government of Kenya failed to follow through on those assurances.<sup>39</sup>

The Trial Chamber subsequently withdrew the charges against Kenyatta on 5<sup>th</sup> March, 2015.<sup>40</sup> In its decision, the Chamber indicated that the Prosecutor would be able to bring 'new charges against the accused at a later date, based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action'.<sup>41</sup>

As with the Situation in Darfur, Sudan, the failure of the Kenyan Government to cooperate with the ICC has created significant investigative challenges for the Prosecutor, impacting on the time and resources that have been required to pursue justice for those who were affected by the post-electoral violence in Kenya. More significantly, lack of State cooperation has contributed, at least in part, to the withdrawal of charges against a key accused, Kenyatta. Again, the obstruction of the Court's investigative activities has had implications for the Court's completion rate, as well as its perceived effectiveness in the eyes of the Court's critics and supporters.

It is clear from the examples above that the failure of States to cooperate with the ICC has had a significant impact on the operation of the Court and has affected its overall efficiency by prolonging the Court's investigations, and even, in the case against

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<sup>38</sup> ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges against Mr. Uhuru Muigai Kenyatta', ICC, 5 December 2014, available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx) (last accessed 22 June 15). The Prosecutor also highlighted two further challenges: that 'several people who may have provided important evidence regarding Mr. Kenyatta's actions, have died, while others were too terrified to testify for the Prosecution' and that 'key witnesses who provided evidence in this case later withdraw or changed their accounts...'.  
<sup>39</sup> Ibid.

<sup>40</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on the Withdrawal of Charges against Mr. Kenyatta, ICC-01/09-02/11-1005 (13 March 2015).

<sup>41</sup> Ibid at para. 9.

Kenyatta, bringing them to a complete standstill. Against this background, the following section considers the relationship between efficiency and non-cooperation from a different angle, by looking at the impact of the efficiency of the ICC on the willingness of States to cooperate with the Court.

### **3. The impact of the efficiency of the International Criminal Court on State cooperation**

Just as the failure of States to cooperate with the ICC can extend the length of the Court's proceedings, the efficiency of the Court could affect the willingness of States to cooperate with the ICC. The following sections discuss the implications of the efficiency of the Court in general terms before looking specifically at the Court's response to non-cooperation.

#### *A. The efficiency of the Court's operation*

The relationship between the efficiency of the ICC and levels of State cooperation is significant in light of theories about why States comply with international law. Different factors have been understood to influence the willingness of States to comply with their international legal obligations, including the threat of sanctions, the protection of national interests, concerns about reciprocity and reputation, the operation of domestic courts, the feasibility and cost of compliance, and the clarity and perceived legitimacy of the relevant rules.<sup>42</sup> One factor that is frequently highlighted in academic literature on State compliance with international law is the reputational cost of non-compliance.<sup>43</sup> This factor is particularly important at the ICC, given the inability of the Court to formally sanction States that fail to comply with its requests for cooperation, beyond a judicial finding of non-cooperation.<sup>44</sup>

The reputational cost of non-compliance with the ICC's requests for cooperation is logically tied to the international reputation of the ICC. The more efficient, impartial, fair and legitimate the ICC is perceived to be, the greater the reputational cost that States are likely to suffer if they fail to comply with the Court's requests for cooperation.<sup>45</sup> The

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<sup>42</sup> For a review of different theories of compliance with international law, see Raustiala and Slaughter, 'International Law, International Relations and Compliance' in Carlsnaes, Risse and Simmons (eds), *The Handbook of International Relations* (London: Sage, 2002) 538.

<sup>43</sup> See e.g. Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823 at 1827.

<sup>44</sup> Art. 87(7) ICC Statute.

<sup>45</sup> Rastan has drawn a connection between perceptions of the ICC and rates of compliance, arguing: 'what an international court may lack in coercive powers it can make up for, in part, by the pull of its legitimacy and moral authority'. Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) *supra* n 4 at 455.

efficiency of the ICC is, of course, only one factor that feeds into the Court's international reputation, but it is an important one. A common refrain in critiques of international courts and tribunals, including the ICC, is the inability of such mechanisms to render justice in a fast and cost-effective manner.<sup>46</sup>

With this in mind, the ICC's early record for efficiency and cost-effectiveness is deeply problematic. In its tenth year of operation, the ICC had only rendered one final judgment, in the case of *Prosecutor v Thomas Lubanga Dyilo*.<sup>47</sup> The trial proceedings in this case, which focused on the narrow charges of conscripting, enlisting and using child soldiers as war crimes in the DRC, took over five years to complete.<sup>48</sup> This was despite the resolve of the Presiding Judge of the Trial Chamber, Judge Fulford, to prevent trials at the Court from 'extending into infinity'.<sup>49</sup> The length of the Court's proceedings in the *Lubanga* case is attributable, in part, to procedural irregularities on the part of the OTP, which led the proceedings to be stayed on more than one occasion in order to protect the rights of the accused.<sup>50</sup> Other cases before the ICC have, however, taken a similar length of time. Trial proceedings in the case of *Prosecutor v Germain Katanga*, which resulted in the conviction of the accused for crimes against humanity and war crimes, took over five years to complete.<sup>51</sup> The case of *Prosecutor v Mathieu Ngudjolo Chui*, which resulted in the Court's first acquittal, was before the Trial Chamber for over four years.<sup>52</sup>

The slow pace of justice at the ICC to date has been seen to contribute to a sense of disillusionment with the 'project' of international criminal justice and a growing sense of impatience amongst State Parties to the ICC Statute, which the Court relies on not only for funding, but also to cooperate with its investigations and to put pressure on other States and international organisations to do the same.<sup>53</sup> Over time, perceptions of

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<sup>46</sup> Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Michigan Journal of International Law* 79 at 80-82.

<sup>47</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo* Judgment pursuant to Article 74 of the Statute, ICC-01/04-1/06-2842 (14 March 2012).

<sup>48</sup> The decision on the confirmation of charges was rendered on 29<sup>th</sup> January, 2007. See ICC, *Prosecutor v Thomas Lubanga Dyilo* Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN (29 January 2007).

<sup>49</sup> Fulford, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215 at 218.

<sup>50</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo* Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401 (13 June 2008). ICC, *Prosecutor v Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red (8 July 2010).

<sup>51</sup> The decision of the confirmation of charges was rendered on 26 September 2008, with a final judgment rendered on 7 March 2014.

<sup>52</sup> The decision of the confirmation of charges was rendered on 26 September 2008, with a verdict issued on 18 December 2012.

<sup>53</sup> Jessberger and Geneuss, 'Down the Drain or Down to Earth? International Criminal Justice under Pressure' (2013) 11 *Journal of International Criminal Justice* 501 at 501.

inefficiency and ineffectiveness could have a negative impact on the reputation of the ICC and affect levels of State support. In order to avoid this risk, it is vital that measures are taken to promote the efficiency of the ICC in every aspect of its operation. A number of measures are already being taken to this end, which will be discussed further in Section 4, below.

Another way in which the ICC can help to counteract perceptions of inefficiency is by developing measures of the Court's progress that do not depend solely on final judgments of the Trial Chamber. Given the size and complexity of cases involving the commission of international crimes, and their ability to be stalled through the non-cooperation of States, it is important to highlight other markers of productivity, such as the completion of interim stages of pre-trial and trial proceedings, the numbers of victims that have participated in the Court's proceedings, and so on. Section 4 will note current efforts being undertaken to this end.

#### *B. Efficiency in responding to instances of non-cooperation*

In order to exploit the reputational costs of non-compliance, it is necessary not only to enhance the reputation of the ICC, but also to respond to instances of non-compliance in a timely and decisive manner. Prompt action is required in order to garner the support of third States and to encourage recalcitrant States to comply with the ICC's cooperation requests.

It has already been noted that the most significant action that the ICC can take in response to non-cooperation is a judicial finding of non-compliance with the Court's cooperation requests. Art. 87(7) ICC Statute allows the Court to make a finding of non-cooperation in the event that a State Party to the ICC Statute refuses to cooperate, and to 'refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.' Art. 87(5)(b) ICC Statute also allows the Court to address the non-cooperation of non-State Parties that have agreed to provide assistance to the ICC pursuant to an *ad hoc* agreement or arrangement with the Court by informing the ASP or, where relevant, the UNSC. A timely response from the Court to instances of non-cooperation is important. It has been highlighted elsewhere that the postponement of the Art. 87(7) ICC Statute procedure 'creates the impression that instances of refusal are condoned; it also carries the risk that a state is "condemned" for failure to cooperate without proper judicial determination'.<sup>54</sup>

The ICC has received criticism for its failure to take decisive action in response to instances of non-cooperation in its early years of operation. The concerns relate largely to the Prosecutor's reaction to uncooperative States. The approach of the Prosecutor is important, given that he or she is 'the most visible and vital actor both inside and

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<sup>54</sup> Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law?' (2008) 6 *Journal of International Criminal Justice* 871 at 884.

outside the tribunal's courtrooms' and 'the official who is most responsible for leading the Court's effort to prod targeted states to cooperate'.<sup>55</sup> The OTP is in a much stronger position to identify instances of non-cooperation than the Court's defence counsel because of its access to information during preliminary examinations and the early stages of the Court's investigations.<sup>56</sup>

Criticisms have been raised in light of the Prosecutor's approach to non-cooperation in both of the situations discussed above (Darfur and Kenya).<sup>57</sup> Sluiter has questioned the Prosecutor's delay in informing the Pre-Trial Chamber of Sudan's failure to cooperate with the Court's investigations in Darfur, given that instances of non-cooperation occurred prior to the issuance of the Court's arrest warrants and that Sudan had 'always openly expressed its dissatisfaction with the Court and its intention not to cooperate'.<sup>58</sup> The Prosecutor's approach prevented the Pre-Trial Chamber from formally notifying the UNSC of Sudan's non-compliance in a timely manner.<sup>59</sup>

In relation to the Situation in Kenya, the Prosecutor has, again, been reprimanded for failing to react quickly enough to non-compliance with the Court's requests for cooperation. In response to the Prosecutor's request for a finding of non-cooperation against the Kenyan Government in the case of *Prosecutor v Uhuru Muigai Kenyatta*, the Trial Chamber of the ICC criticised the Prosecutor's delay in following up on the Kenyan Government's compliance with the relevant cooperation request.<sup>60</sup> The Chamber stressed:

[T]he issue of the Kenyan Government's cooperation with the Records Request should have been addressed at a much earlier stage; doing so would, to a significant degree, have mitigated the impact that the non-compliance has had on the proceedings in this case.<sup>61</sup>

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<sup>55</sup> Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) *supra* n 10 at 659-660.

<sup>56</sup> See University of Nottingham Human Rights Law Centre, 'Report: Expert Workshop on Cooperation and the International Criminal Court', *University of Nottingham HRLC*, September 2014, available at: [www.nottingham.ac.uk/hrlc/newsholding/news-2015/cooperation-workshop-report-published.aspx](http://www.nottingham.ac.uk/hrlc/newsholding/news-2015/cooperation-workshop-report-published.aspx) (last accessed 14 August 2015), which details the conclusions of the Expert Workshop on Cooperation with the International Criminal Court.

<sup>57</sup> See e.g. Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law?' (2008) *supra* n 54. Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) *supra* n 10 at 655.

<sup>58</sup> Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law?' (2008) *supra* n 54 at 873.

<sup>59</sup> Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) *supra* n 10 at 671.

<sup>60</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute (2014) *supra* n 33 at paras 86-90.

<sup>61</sup> *Ibid* at para 86.

It was against this background, and more general concerns about the timeliness and thoroughness of Prosecution investigations in the case against Kenyatta, that the Trial Chamber refused to adjourn the case until the Kenyan Government had complied with the cooperation request and decided not to refer the matter to the ASP.<sup>62</sup> In its Judgment, reversing the Trial Chamber's decision on Kenya's failure to cooperate, the Appeals Chamber acknowledged that "the conduct of the requesting party, in this case the Prosecutor, may... be a relevant factor [in considering the failure of a State to cooperate or the appropriateness of referring a matter of non-cooperation to the ASP under Article 87(7) of the ICC Statute] if the actions of the requesting party have negatively impacted the requested State's ability to cooperate".<sup>63</sup>

The risk for the Prosecutor - and the ICC more generally - in taking a decisive approach to non-cooperation is that it could lead States to become more resistant to the ICC's investigations.<sup>64</sup> The Court's investigations in Darfur and Kenya have, however, shown that a lenient approach to non-cooperation may not only fail to encourage States to cooperate with the Court, but that it may also undermine the perception of the ICC as a strong institution that can respond effectively to instances of non-compliance. Whilst each situation is different, the examples of Darfur and Kenya suggest that tolerance of non-cooperation may be more damaging to the Prosecutor's cause than decisive action.

In order to promote cooperation with the ICC's investigations, it is important that the Court's response to non-cooperation is not only prompt, but also consistent. Inconsistent responses could raise ambiguities as to the obligations that States hold under the ICC's cooperation regime and weaken the Court's compliance pull. This is another area in which the Court has received criticism. Concerns have been raised, for example, in light of the decision of the Pre-Trial Chamber to refer the DRC to the UNSC for failing to cooperate with the ICC in the arrest and surrender of President Al Bashir when the Chamber had used its discretion not to refer Nigeria under similar circumstances, namely the attendance of President Al Bashir at a conference on the territory of the requested State.<sup>65</sup>

It is not only the ICC that must demonstrate strength and consistency in responding to instances of non-cooperation; the Court also relies upon the ASP and, where the UNSC has referred a situation to the Court, the UNSC to take decisive action in the event of non-compliance with the Court's cooperation requests. To date, the UNSC has failed to take a firm response to the ICC's findings of non-cooperation and has not taken

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<sup>62</sup> Ibid at paras 83 and 86-90.

<sup>63</sup> ICC, *Prosecutor v Uhuru Muigai Kenyatta* Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' (2015), supra n 37 at para 87.

<sup>64</sup> Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) supra n 10 at 666 or 676.

<sup>65</sup> University of Nottingham Human Rights Law Centre, 'Report: Expert Workshop on Cooperation and the International Criminal Court' (2014) supra n 56 at para 33.

measures to sanction uncooperative States. The frustration of the Prosecutor of the ICC with the lack of support from the UNSC in relation to its investigation in Darfur is evident in her statement in December 2014. The statement notes:

It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again, most of which are well known to this Council. Not only does the situation in Darfur continue to deteriorate, the brutality with which crimes are being committed has become more pronounced. Women and girls continue to bear the brunt of sustained attacks on innocent civilians. But this Council is yet to be spurred into action. Victims of rapes are asking themselves how many more women should be brutally attacked for this Council to appreciate the magnitude of their plight.<sup>66</sup>

In order for the ICC to succeed in bringing perpetrators to justice for the most serious crimes of concern to the international community as a whole, a prompt and consistent response is required from both within and beyond the ICC. Whilst measures can be taken to improve the Court's responsiveness to instances of non-cooperation, the ICC will remain reliant on States, international and regional organisations, and civil society to support its activities by taking firm diplomatic, and, where possible, coercive, action against uncooperative States. The UNSC must take a firm approach to non-cooperation in relation to situations that it has referred to the ICC, which not only concern grave international crimes but, by definition, constitute threats to international peace and security.<sup>67</sup>

#### **4. Towards a more efficient and effective International Criminal Court**

In the sections above it has been argued that just as non-cooperation can have a negative impact on the efficiency of the Court, the inefficiency of the Court could have a negative impact on the willingness of States to cooperate. The two issues can be seen to affect one another. It is possible that the relationship between the Court's efficiency and State cooperation could even have a cyclical dimension, whereby inefficiency within the ICC could reduce levels of State cooperation, which could, in turn, produce further inefficiency. In order to break this cycle, measures must be taken by the ICC and the ASP to improve the efficiency of the Court in every aspect of its operation, including its response to issues of non-cooperation.

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<sup>66</sup> ICC-OTP, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *supra* n 25.

<sup>67</sup> Art. 13 ICC Statute allows the Security Council to refer situations to the Court, acting under Chapter VII UN Charter.

*A. Improving the efficiency of the International Criminal Court*

The ASP has been focusing on the efficiency of the ICC for a number of years. In 2010, it established a Study Group on Governance (Study Group) to facilitate ‘a structured dialogue between States Parties [to the ICC Statute] and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court’, to ‘[identify] where further action is required, in consultation with the Court’, and to ‘[formulate] recommendations to the Assembly’.<sup>68</sup>

Following its establishment, the Study Group invited the ICC to undertake a review of lessons learnt in the first ten years of the Court’s operation, with a view to identifying measures that could be taken to expedite judicial proceedings and enhance their efficiency.<sup>69</sup> To this end, the ICC produced a report in October 2012, entitled ‘Lessons Learnt: First Report of the Court to the Assembly of States Parties’.<sup>70</sup> The Report identified nine issues that required further consideration and proposed a road map of steps to be taken to ‘ensure timely discussions and actions’.<sup>71</sup> A ‘Draft Roadmap on Reviewing the Criminal Procedures of the International Criminal Court’<sup>72</sup> was adopted by the ASP in November 2012 to support the amendment of the ICC RPE in response to issues identified by the Court in its Report on Lessons Learnt.<sup>73</sup>

Whilst certain changes to the ICC’s working practices require amendment of the ICC RPE, others are being carried out informally, and more quickly, within the different organs and offices of the Court. The Draft Strategic Plan of the OTP (2016-2018), for example, identifies a number of different initiatives that have been taken to improve the organisational performance of the OTP and notes efficiency gains that have, consequently, been made in the period from 2012-2015.<sup>74</sup> Further changes are being carried out under the aegis of the Registrar’s ‘ReVision Project’, which seeks to

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<sup>68</sup> ASP, Establishment of a Study Group on Governance, 10 December 2010, ICC-ASP/9/Res.2 at paras 1 and 2.

<sup>69</sup> ASP, Report of the Bureau on the Study Group on Governance, 22 November 2011, ICC-ASP/10/30 at para 25.

<sup>70</sup> ASP, Study Group on Governance: Lessons Learnt: First Report of the Court to the Assembly of States Parties, 23 October 2012, ICC-ASP/11/31/Add.1.

<sup>71</sup> Ibid at para 3.

<sup>72</sup> Ibid at Annex 1.

<sup>73</sup> Ibid at para 4.

<sup>74</sup> ICC-OTP, ‘OTP Strategic Plan 2016-2018’, ICC, 6 July 2015, available at: [www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-rep-150708.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-rep-150708.aspx) (last accessed 21 August 2015). See, in particular, paras 19-21.



‘reorganize and streamline the Registry’s organizational structure’,<sup>75</sup> pursuant to a mandate from the ASP.<sup>76</sup>

The measures outlined above have the potential to increase the efficiency of the ICC significantly and, in doing so, increase levels of State support for the ICC and enhance the strength of its cooperation regime. The challenge for the ICC is to carry out wide-ranging reforms in order to promote the efficiency of the Court whilst safeguarding the rights of the accused and ensuring that the proceedings remain accessible and meaningful for the victims and communities that have been most severely affected by the commission of international crimes. The international reputation of the ICC depends, after all, not only on the Court’s efficiency, but also on its perceived fairness and effectiveness in the pursuit of justice and accountability.

In light of the discussion in Section 3.A. above, it is also important to note that the Registrar has been working on the development of benchmarks or indicators to measure the performance of the Registry and has recognised ‘a wider question as to the possibility of such indicators for the Court as a whole’.<sup>77</sup> The OTP has also developed performance indicators to help assess its operation and the implementation of its Strategic Plan.<sup>78</sup> Such indicators could play a useful role in presenting a more nuanced account of the ICC’s operation than assessments that focus solely on the Court’s final decisions and help to strengthen the Court’s international reputation by providing reassurance as to its productivity.<sup>79</sup>

#### *B. Expediting responses to non-cooperation*

Efforts have also been made to support a timely response to the failure of States to comply with the ICC’s cooperation requests. Alongside its work on the efficiency of the ICC, the ASP has been working on the issue of non-cooperation. In 2011, the ASP

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<sup>75</sup> ASP, Report on the review of the organizational structure of the Registry Outcomes of Phase 4 of the ReVision Project Decisions on the structure of the Registry, 4 May 2015, ICC-ASP/14/18.

<sup>76</sup> ASP, Programme budget for 2014, the Working Capital Fund for 2014, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2014 and the Contingency Fund, 27 November 2013, ICC-ASP/12/Res.1 at Section H, para 3.

<sup>77</sup> Von Hebel, ‘Registrar of the International Criminal Court, Speaking Points for the Diplomatic Briefing’, ICC, 17 November 2014, available at: [www.icc-cpi.int/iccdocs/db/registrar-remarks-24DB-17-11-2014.pdf](http://www.icc-cpi.int/iccdocs/db/registrar-remarks-24DB-17-11-2014.pdf) (last accessed 21 August 2015) at 4. See also Swiss Federal Department of Foreign Affairs, ‘Retreat on Strengthening the Proceedings at the International Criminal Court: Chair’s Summary’, *Federal Department of Foreign Affairs*, 3-5 September 2014, available at:

[www.eda.admin.ch/content/dam/eda/en/documents/dfa/dfa\\_aussenpolitik\\_voelkerrecht\\_Chair\\_Summary\\_%20ICC%20Retreat\\_en.pdf](http://www.eda.admin.ch/content/dam/eda/en/documents/dfa/dfa_aussenpolitik_voelkerrecht_Chair_Summary_%20ICC%20Retreat_en.pdf) (last accessed 24 August 2015) at para 2.3.

<sup>78</sup> See ICC-OTP, ‘OTP Strategic Plan 2016-2018’ (2015) supra n 74 at paras 103-109. See also Annex 4, ‘Link between goals, budget objectives and performance indicators 2016’.

<sup>79</sup> See Swiss Federal Department of Foreign Affairs, ‘Retreat on Strengthening the Proceedings at the International Criminal Court: Chair’s Summary’ (2014) supra n 77.

produced its Procedures Relating to Non-Cooperation (Procedures), which elaborate on the measures that the ASP can take in situations where States fail to comply with their obligations to cooperate with the Court.<sup>80</sup>

The Procedures make a number of references to prompt action. For example, where the Court has made a decision regarding non-cooperation that is addressed to the ASP, the decision should be 'forwarded to all States Parties without delay'.<sup>81</sup> An Emergency Bureau meeting could then be 'convened at short notice'.<sup>82</sup> An open letter from the President of the ASP may be sent to the State concerned 'within a specified time limit of no more than two weeks'.<sup>83</sup> A meeting of the Bureau could then be held '[u]pon expiration of the time limit or upon receipt of a written response',<sup>84</sup> and so on. Whilst the measures referred to in the Procedures are weak, in that they are confined to various forms of diplomatic pressure, the process that is envisaged is one that has momentum and promises to place sustained pressure on States to comply with their legal obligations.

The Procedures also acknowledge the need for the ASP to take an urgent, informal response to non-cooperation in situations where the Court has not made a judicial determination on non-cooperation under Art. 87 ICC Statute, referring the matter to the ASP. Such measures can be taken where:

[T]here are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person (article 89 of the Rome Statute) is about to occur or is currently ongoing and urgent action by the Assembly may help bring about cooperation.<sup>85</sup>

Consequently, the Procedures allow the ASP to act more quickly than the ICC, and even allow it to pre-empt a situation of non-cooperation involving the arrest and surrender of an individual to the Court.

Whilst the ASP has an important role to play in responding to instances of non-cooperation, a prompt and consistent response from within the ICC remains crucial. One reason for this is that the Procedures restrict the circumstances under which the ASP can act informally without a judicial decision on non-cooperation. A judicial decision on non-cooperation is also important in order to send a clear message that non-compliance with

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<sup>80</sup> ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 21 December 2011, ICC-ASP/10/Res.5 at Annex, 'Assembly Procedure Relating to Non-Cooperation': as amended by ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 21 November 2012, ICC-ASP/11/Res.8 at Annex.1.

<sup>81</sup> Ibid at para 13.

<sup>82</sup> Ibid at para 14(a).

<sup>83</sup> Ibid at para 14(b).

<sup>84</sup> Ibid at para 14(c).

<sup>85</sup> ASP, Strengthening the International Criminal Court and the Assembly of States Parties (2011) *supra* n 80 at Annex 'Assembly procedures relating to non-cooperation' 7(b).

the Court's requests for cooperation will not be condoned and to avoid any ambiguity as to whether or not certain States have complied with their legal obligations.<sup>86</sup>

In order to strengthen the ICC's cooperation regime and increase the reputational damage that stems from non-cooperation it is crucial that all relevant actors, including the ICC, the ASP and the UNSC, respond promptly and consistently to instances of non-cooperation.

## 5. Conclusion

It has been argued elsewhere that '[t]he inability [of the ICC] to arrest accused leaders for instance – as in Sudan – is a failure of political will, and not a failure of international criminal justice.'<sup>87</sup> The purpose of this chapter is to suggest that the failure of States to cooperate with the ICC in the arrest and surrender of suspects, or other forms of cooperation, must be viewed, at least in part, as a failure of international criminal justice, and a failure of the ICC. This is due to the relationship between the reputation of the ICC and the willingness of States and other institutions to support and cooperate with its investigations.

In order to enhance levels of State cooperation, the Court must prove itself to be an efficient and effective mechanism, capable of rendering fair and impartial justice in the aftermath of the commission of international crimes. By bolstering its reputation, the Court can encourage greater levels of support for its activities and deter instances of non-cooperation by increasing the reputational costs that they entail. A reduction in instances of non-cooperation can, in turn, enhance the efficiency of the ICC and encourage greater international support for its operation in a cyclical fashion. It is also important that the ICC responds quickly and consistently to instances of non-cooperation. A prompt response is necessary in order to exploit the reputational costs of non-compliance and increase the pressure that is placed on States to comply with the Court's requests for cooperation.

Measures to improve the efficiency of the ICC are ongoing within the Court and the ASP. The challenge facing practitioners and policy-makers involved in the reform process is to make the necessary changes to the ICC's system of justice without jeopardising the fairness of the Court's proceedings and their significance in the eyes of victims that have suffered as a result of the commission of international crimes. This is important in light of the fact that the international reputation of the Court does not rest on productivity and cost-effectiveness alone. Of course, no matter how efficient the ICC is, the Court will

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<sup>86</sup> Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law?' (2008) *supra* n 54 at 884.

<sup>87</sup> Akhavan, 'The Rise, and Fall, and Rise of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 527 at 530.

always be dependent on external actors - States, civil society and international organisations - to support its investigations. It is hoped that as the ICC matures and proves itself to be an efficient and effective criminal justice mechanism, its support network will become stronger and instances of non-cooperation may be more easily addressed.